

MEMORANDUM

To: Rollo Pool, Southeast Conference
From: Stephanie Pingree, Ecology & Environment, Inc.
CC: Mary Siroky, Cedarbrook Consulting
Date: June 2, 2005
Re: Solid Waste Regional Entity Project

In response to Southeast Conference's March 2005 request for proposals (RFP) and subsequent conversation with you, Ecology and Environment, Inc. (E & E) has developed the attached matrix outlining regional entities that may be used in dealing with regional solid waste issues in Southeast Alaska. The matrix was developed through reviewing websites of regional solid waste organizations throughout the United States, interviewing executive directors or planners of select solid waste entities, and review of Alaska statutes. This information is intended to provide Southeast Conference with basic information regarding operations and management of different business structures. It does not provide all restrictions or requirements for operations. Although the matrix has had limited review by E & E's legal team, a full review by an attorney and/or accountant should be performed before moving forward with any of the entities outlined in this memorandum or attached matrix.

After review of regional solid waste entity websites provided by Southeast Conference, as well as others identified by E & E, multiple business structures were identified as potentially viable to address Southeast Alaska's regional solid waste needs. These organizations include the following: for-profit corporation, non-profit corporation, limited liability company, cooperative corporation, partnership, authority, joint government agreements, federation, and commission. Each of these entities is discussed below. The two most common entities encountered in E & E's research of solid waste entities include solid waste authorities and joint government agreements. Both structures are discussed in more detail below.

For-Profit Corporation

For-profit corporations are established under Alaska Statutes (AS) 10.06 and can be established for any lawful purpose. A For-Profit Corporation is owned by anyone who owns stock. Votes in the corporation are divided by shares, which could lead to unequal voting between shareholders. In addition, there are obvious tax disadvantages associated with for-profit corporations.

Nonprofit Corporation

Nonprofit corporations are established under AS 10.20 and can be established for any lawful purpose including commercial or industrial purposes. A nonprofit corporation is owned by its members. Management of the corporation is through a Board of Directors elected by its members and voting is usually one vote per member unless otherwise stated in the articles or bylaws. There can be one or more classes of members as set out in the bylaws. Nonprofit corporations, in general, are able to receive grant funds. Municipalities would be able to issue bonds to finance the projects of a nonprofit

corporation but the nonprofit corporation is not likely to be able to issue bonds on its own. This illustrates the main disadvantage of the nonprofit corporation; its abilities are limited in comparison to other entities that are created for purely public purposes.

Limited Liability Company

Limited Liability Companies (LLC) are established under AS 10.50 and can be established for any lawful purpose. It is owned by members who must own interest in the company. Voting and profit distribution is established through the operating agreement. As with for-profit corporations, there is the potential disadvantage for tax purposes. In addition, LLCs are not generally eligible for grant funding although not specifically excluded.

Cooperative Corporation

A Cooperative Corporation is established under AS 10.15 and can be established for any lawful purpose except as specified in Alaska law. Solid waste entities are not identified as excluded from cooperative organization. A Board of Directors manages a cooperative and membership is based on ownership of shares of membership stock or payment of a membership fee as set out in the articles. Each member has one vote unless the bylaws authorize voting according to actual, estimated, or potential patronage, or a combination of these approaches.

Partnership

Limited Partnerships are established under AS 32.11 and Limited Liability Partnerships are established under AS 32.06. Limited partnerships have one or more general partners, who control the business and are liable for debts and obligations of the partnership, and one or more limited partners, who are not as involved and who have limited liability such as a shareholder in a corporation. It is assumed that all members of the solid waste regional organization would like to be actively involved and therefore this option was not further evaluated.

Limited Liability Partnerships are similar to a general partnership except normally a partner does not have personal liability for the negligence of another partner. Professionals, such as accountants and lawyers, generally use this business structure. For both a Limited Liability Partnership and a Limited Partnership, tax liability flows directly through to the owners and the entity itself is not taxed. Because of these restrictions, both types of partnerships were not investigated any further.

Federation and Commission

Federation and Commission organization and operation are not specifically addressed in Alaska statutes. In addition, examples of either type of organization managing solid waste on a regional basis were not found.

Generally speaking, a federation is a league or union of states, groups or people arranged with a strong central authority within a limited region. However, the members of the federation commonly retain various rights and powers to act independently of the federation. One solid waste federation, Federation of New York Solid Waste

Association, is an umbrella organization for multiple solid waste associations in New York State. It serves as a professional organization and does not own, operate, or manage any solid waste facilities.

A commission is a body of persons acting under lawful authority to perform certain public services. It is commonly used by single jurisdictions to transfer the accomplishment of a specific public function to a new organization. For example, the Federal Commission was established by Congress to regulate interstate and international communications by radio, television, wire, satellite and cable within the United States.

Authority

Alaska statutes allow for Port Authorities (AS 29.35.600) and Regional Resource Development Authorities (AS 30.13). Both of these authorities can be established for transportation purposes only. Solid waste authorities or general authorities that can be used for solid waste issues are not specifically addressed in Alaska statutes. It is possible that the "Port Authority" statute could be used as the mechanism to establish an entity responsible for shipping solid waste around Southeast Alaska; AS 29.35.600 states that Port Authorities can be created for "transportation related commerce within the territory of the authority". A Port Authority requires parallel ordinances in each participating community as well as approval by the voters of each community.

Solid Waste Authorities are used extensively throughout the country to address both local and regional solid waste needs. E & E researched regional Solid Waste Authorities throughout the country to identify their management and operation. Below are some examples of how regional solid waste authorities are operating.

The Revised Code of Ohio, Title III, Chapter 343, created solid waste management districts. The Solid Waste Authority of Central Ohio was created under this law. They are one of 52 solid waste districts in the state. The Solid Waste Authority runs the landfill, encourages recycling through education programs, and finds new uses for recyclables but does not pick up the trash curbside. The authority is a government body that answers to a 9 member Board of Trustees. The authority has the power to levy taxes and issue bonds, if needed.

The Coastal Regional Solid Waste Management Authority in North Carolina was formed in 1990 through an agreement between three counties. In 1989, the state legislature adopted General Statutes of North Carolina 153A-22 which authorizes and set forth the process for creating Solid Waste Management Authorities. Each participating county adopted a resolution to form the Coastal Regional Solid Waste Management Authority. The authority's purpose is to provide an environmentally sound, cost effective system of solid waste disposal for the citizens of the three member counties. The organization is a public authority, governed by a 7 member Board of Directors representing the member counties. Seats, and votes, on the board were assigned by population and ensuring that no one county had the majority of the board members. The organization operates four facilities including an administrative office, landfill, and two transfer stations. Participating members are responsible for collection of waste. The organization is

funded through an initial bond that financed all capital and tipping fees for operation and repaying bond.

Joint Government Agreements

Under AS 29.35.010 and Article X, Section 13 of the Alaska Constitution, all municipalities have the power to enter into an agreement, including an agreement for cooperative or joint administration of any function of power with a municipality, the state, or the United States. This power is not allowed for unincorporated areas, therefore not all communities in Southeast Alaska would be allowed to enter into these agreements without changes to the Alaska statutes or utility service areas of neighboring municipalities.

E & E identified many agencies that operate through some form of a joint government agreement. Examples of how a few of these organizations operate and are managed are discussed below.

The Land of Sky Regional Council in North Carolina was set up by the legislature to address multiple regional issues, one of which is solid waste. It is made up of local government agencies (4 counties and 15 municipalities). A Board of Directors comprised of representatives from each of the government agencies in addition to other representatives, such as community and industry representatives, manage the regional council. Each board member is a voting member. The regional council provides recycling, household hazardous waste disposal, and educational activities. Each of the member governments operates their own solid waste activities such as transportation, pick-up, and disposal individually. According to a representative at the organization, the regional council was not able to operate as a regional government due to past experience not being able to cooperate on regional issues and failure to ensure equitable issues among members.

The Bluestem Solid Waste Agency is another example of a regional government agency representing six counties and participating cities in Iowa. The agency operates recycling center, pollution prevention center, etc. and provides assistance to participating members; landfills are publicly owned and not a part of the agency. The agency was developed through legislation that allows for government agencies to join together. A Board of Directors made up of elected officials from participating governments manages the organization. The organization is funded primarily from tipping fees.

The Solid Waste Authority of Salinas is a joint power agency set up by California statutes allowing for local governments to join together addressing common issues in their communities. The organization owns and operates a common landfill and the participating cities are in charge of pick-up and transportation to that landfill. The management of the organization is through a board representing member cities and unincorporated areas. Voting rights are distributed based on the population of the member organization. The organization's operation is funded through grants and tipping charges.

Conclusion

A solid waste authority or agency formed through specific language addressing solid waste authorities in state statutes or formed through a joint government agreement is the most common type of regional solid waste organization found through our research. Joint government agreements are currently permitted under Alaska statutes and could be used to form a regional solid waste authority or agency in Southeast Alaska. The management, ownership, voting power, and ability to issue bonds could be set out in a memorandum of agreement signed by all participating governments. The formation of a solid waste authority or agency in this manner would require no changes to the current statutes. Changes to Alaska statutes would be required if a solid waste authority was to be set up by the legislature as was done in the Ohio and North Carolina examples above.

Att.

Solid Waste Entity Matrix
Southeast Conference, June 2005

	For Profit Corporation <i>AS 10.06¹, et seq.</i>	Non-Profit Corporation <i>AS 10.20², et seq.</i>	Limited Liability Company <i>AS 10.50³, et seq.</i>	Cooperative Corporation <i>AS 10.15⁴, et seq.</i>	Joint Government Agreements⁵	Authority AS 29.35.600 and AS 30.13.010⁶
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	For Profit Corporation AS 10.06¹, et seq.	Non-Profit Corporation AS 10.20², et seq.	Limited Liability Company AS 10.50³, et seq.	Cooperative Corporation AS 10.15⁴, et seq.	Joint Government Agreements⁵	Authority AS 29.35.600 and AS 30.13.010⁶
Purpose	Any lawful purpose.	Any lawful purpose including commercial or industrial.	Any lawful purpose.	Any lawful purpose, except banking or insurance or the furnishing of electric or telephone service.	For cooperative or joint administration of any function or power of the municipality.	Port Authority – Provide for the development of a port or ports for transportation related commerce within the territory of the authority. It is possible that for just the transportation portion of a regional solid waste authority that this statute could be used. Regional Resource Development Authority – improvement, establishment, and development of facilities in its district for transportation purposes in connection with natural resource enterprises
Ownership	Anyone who owns stock.	Members.	Members who own interests.		Can be specified in agreement.	Members.
Management	Board of Directors elected by shareholders.	Board of Directors elected by members.	Manager, all members, or Board of Directors as stated in the articles of organization.	Board of Directors	Can be specified in agreement.	Board of Directors appointed or elected as specified in ordinance.

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Membership	Shareholders.	May have one or more classes of members.	Membership gained by acquiring interest.	Based on ownership of a share of membership stock or payment of a membership fee as set forth in the articles.	Borough, and 1 st or 2 nd class city. Unincorporated areas not eligible.	Participating municipalities/organizations.
When Members Can Join	Anytime.	Anytime.	Anytime.	Anytime.	Can be specified in agreement.	Port Authority – One or more municipalities may join upon adoption of parallel ordinances by governing bodies of each affected municipality.
Voting	Equal vote per share within class; Number of shares based on consideration paid money, other property, or services. Could lead to unequal voting rights between shareholders.	One vote per member, usually, but can be varied in the articles or bylaws.	As per operating agreement.	Each member has one vote except bylaws may authorize voting according to actual, estimated or potential patronage, or a combination of these plans of voting. Shares of stock may not be given voting power except in specific instances.	Can be specified in agreement.	

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Liability of Owners	Limited Liability of Owners.	Limited Liability of Owners.	Limited Liability of Owners.	Member is not liable for the debts in an amount exceeding the sum remaining unpaid on the member's subscription for shares of the cooperative, and the sum remaining unpaid on the member's membership fee if a fee is required.	Not specified.	Port Authority – Liability incurred shall be satisfied exclusively from the assets and revenue of the authority. Creditor does not have a right of action against the municipality participating in the authority. - Board member or employee of authority is not subject to personal liability or accountability because of execution or issuance of bonds.
Profit Distribution	Based on shares, but there can be different types of shares with different rights.	Not allowed to issue stock or pay dividends to members or officers.	As specified in Operating Agreement.	A cooperative organized with capital stock may pay a dividend on capital stock authorized by its articles if its capital is not impaired and would not be impaired by the payment.	Not specified.	

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Ability to Receive Funds	Less practical.	Can receive grants and loans.	Less practical.	Less practical.	Once formed is could have only those powers of taxation as one or more of the participating governing bodies and only as specifically provided in the agreement proposing creation of the joint government agreement. Is likely to be able to issue bonds.	Port Authority - Can accept grants and loans. If authorized by ordinance, can borrow money and issue bonds.
Requires Federal or State Statute/Regulation Change	No.	No.	No.	No.	No.	Yes.
Legally Mandated Minimum Staffing Requirements	No.	No.	No.	Requires in-state agent.	No.	Board appoints chief executive officer.
Exempt from Federal Income Tax	Not generally.	May qualify but more difficult. Usually 501(c)(3) charitable or 501(c)(4) social welfare exemptions.	Not generally.		Not specified.	

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Exempt from State Income Tax	No.	No, unless operating solely for religious, charitable, etc. purposes.	Not generally.		Not specified.	Yes (AS 29.35.670)
Regulated Time and Cost to Form Entity	\$150 filing of articles fee.	\$50 filing of articles fee.	\$150 filing fee.	Biennial fee of \$100.	No regulated cost. Time needed to draft MOA agreeable to all parties.	Not only requires parallel ordinances but also a vote of the citizens of each participating community which takes time and is costly
Formation	Filing of Articles of Incorporation with the State.	Three or more persons may act as incorporators of a non-profit corporation by signing and filing articles of incorporation.	Filing of Articles of Organization with the State.	Three or more persons may act as incorporators of a cooperative by filing articles.	Formed through appropriate action by ordinance, resolution, or otherwise pursuant to the law of the participating governing bodies.	Port Authority – (1) Municipality creates by ordinance as a public corporation of the municipality, (2) Two or more municipalities create by parallel ordinances adopted by each of the governing bodies as a public corporation of the municipalities.

¹ AS 10.06 – Alaska Corporations Code

² AS 10.20 – Alaska Nonprofit Corporation Act

³ AS 10.50 – Alaska Revised Limited Liability Company Act

⁴ AS 10.15 – Alaska Cooperative Corporation Act

⁵ AS 29.35.010 and Article X, Section 13 of the Alaska Constitution

⁶ AS 29.35.600 –Port Authorities; AS 30.13.010 - Regional Resource Development Authorities

JOINT GOVERNMENT AGREEMENT TEMPLATE

INSTRUCTIONS

The Joint Government Agreement Template is designed as a template for the development of a solid waste regional authority. The template can easily be modified for use in the establishment of any type of Joint Government Agreement. Below is a list of sections where template users may consider different options.

- Intent of the Parties- determine if all the issues leading up to the formation of a joint government agreement are captured. For joint government agreements dealing with different issues insure that all the reasons for formation are listed here.
- Membership – consider who is to be a member. A joint government authority can provide services to entities that are not members via contracts.
- Board – determine if board membership results in a one to one ratio of membership on the board. Should board members be members of the participating local government or should local government authorities appoint them?
- Terms of Office – is three years an appropriate term of office? Does this match the terms of office of local government officials? One-year terms of office are common.
- Executive Director – determine if there are additions or deletions to the list of responsibilities for the Executive Director. For joint government agreements dealing with different issues this may differ dramatically.
- Meetings – should the board meet more or less often than quarterly? Determine if travel and per diem costs of board members are to be paid by the authority?

- Powers of an Authority- review the list or responsibilities of the regional solid waste authority and determine if this is complete. For joint governmental agreements dealing with different issues this list will need to be modified.
- Duration of the Agreement – is 15 years long enough? Too long? For joint governmental agreements dealing with different issues the duration of the agreement may be much different.
- Disposition of Authority Assets and Liabilities Upon Termination - if an authority does not have assets this section may not be needed.

JOINT GOVERNMENT AGREEMENT TEMPLATE

***Italics* represent information that may need to be added as a final agreement is drafted as appropriate.**

1. DEFINITIONS

- a. “Agreement” means this Joint Government Agreement.
- b. “Contract Date” means the date of this Agreement.
- c. “Disposal” means the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste into or on any land or water so that the solid waste or any constituent part of the solid waste any enter the environment or be emitted into the air or discharged into any waters, including groundwaters.
- d. “Landfill” means a disposal facility or part of a disposal facility where waste is placed in or on land, which is not a land treatment facility, a surface impoundment, an injection well, a hazardous waste long-term storage facility or a surface storage facility.
- e. “Party” or “Parties” means the municipalities, cities or local government as the context or usage of the term any require.
- f. “Solid Waste Management” means purposefully, systematic, control of generation, storage, collection, transport, separation, treatment, processing, recycling, recovery and disposal of solid waste.
- g. “State” means the State of Alaska and all of its appropriate administrative, contracting and regulatory departments and offices.
- h. “Unit of Local Government” means a Unified Home Rule Municipalities, Home Rule Borough, 2nd Class Borough, 1st and 2nd class city
- i. Define technical and scientific terms used in the agreement.

2. INTENT OF THE PARTIES

- a. The Parties are concerned that relying on shipping solid waste outside of the state reduces the communities control over costs.
- b. The Parties believe that by working together to manage solid waste on a regional basis the cost of solid waste disposal for all communities in Southeast Alaska will be reduced.
- c. Additionally the Parties believe that it is in the best interest of all the communities in Southeast Alaska that there are landfill disposal options available, regionally, to the communities of Southeast Alaska.

3. PARTIES/AUTHORITIES

- a. This agreement authorizes the establishment of an authority that will plan for, develop and manage a regional solid waste transportation system and potentially plan, purchase the land for, develop, construct and operate a regional solid waste disposal (landfill) facility.
- b. Each of the Parties (LIST PARTIES HERE)
 - i. CITY AND BOROUGH OF JUNEAU (“Juneau”), a unified home rule municipality;
 - ii. CITY AND BOROUGH OF SITKA (“Sitka”), a unified home rule municipality;
 - iii. CITY OF KAKE (“Kake”), a 1st class city; and C
 - iv. CITY OF THORNE BAY (“Thorne Bay”), a 2nd class city.

Add additional communities as necessary

- c. Each of the Parties to this Agreement is a local government entity functioning within the State of Alaska.
- d. The Parties have the authority to enter in this agreement pursuant to section 29.35.010 (13) of the Alaska Statutes and Article X, section 13 of the Alaska Constitution which states that all municipalities have the power to enter into an agreement, including an agreement for cooperative or joint administration of any function or power with a municipality, the state, or the United States.
- e. Each of the Parties to this Agreement has the power, in addition to other powers which are common to each of them, to undertake and perform: solid waste planning and program management, including collection services and siting; the development, construction, and operation of solid waste facilities, including recovery of recyclable and compostable materials; and the transfer and disposal of solid waste generated within each of the Parties jurisdictional boundaries. *Each of the participating parties will need to check their municipal ordinances to insure they have the powers talked about in this paragraph. The state in Sec 29.35.050 grants a municipality the ability to assume these powers by ordinance but there is the possibility that some communities have not taken on these powers.*

4. ESTABLISHMENT OF THE AUTHORITY:

- a. There is established an Authority which shall be a public entity separate from the Parties to this agreement.
- b. The name of the Authority shall be the SOUTHEAST ALASKA REGIONAL SOLID WASTE MANAGEMENT AUTHORITY.
- c. The boundaries of the authority shall encompass the territorial jurisdiction of the members of the authority.

5. MEMBERSHIP; BOARD; DELEGATES

- a. Each Party signing on to this agreement shall become a member of the regional solid waste management authority. There after any unit of local government may join the authority by

agreeing to the provisions of this agreement and by being admitted by unanimous vote of the existing members.

- b. All the rights and privileges of membership in a regional solid waste management authority shall be exercised on behalf of the member units of local government by a board composed of delegate to the authority who shall be appointed by and shall serve at the pleasure of the governing boards of their respective units of local government.
- c. A vacancy on the board shall be filled by appointment by the governing board of the unit of local government having the original appointment.

6. MEMBERSHIP

- a. The authority shall be governed by a Board of Directors composed of a representative from each of the participating communities and two representatives from the City and Borough of Juneau who have a population twice as large as any other participating community.
- b. For the transaction of business, a quorum consists of one greater than half the members.

7. TERMS OF OFFICE, ALTERNATES, OFFICERS

- a. The term of office of each member of the Authority Board shall be three (3) years and shall not exceed the term of the elective office, which the member holds.
- b. Each Party may, in addition to their respective regular appointments, appoint one or more elected officials who will serve as alternate appointees and members of the Authority Board and each such alternate appointee and member shall be empowered to cast votes in the absence of a regular appointee and member or in the event of a disqualification to vote because of conflict of interest. Each alternate appointed shall be a member of the governing body of the Party making such appointment.
- c. At its first meeting and thereafter at the first meeting of every third year, the Board of Directors shall elect a President, Vice-President, and such officers as the Authority Board find appropriate, to the serve the Authority Board for a term of three (3) years unless sooner terminated at the pleasure of the Authority Board. In the event the officer so elected ceases to be a Director, the resulting vacancy shall be filled at the next regular meeting of the Authority Board held following the occurrence of the vacancy. In the absence or inability of the President to act, the Vice-President shall act as President. The President, or in the absence of the President, the Vice-President, shall preside at and conduct all Authority Board meetings.

8. EXECUTIVE DIRECTOR

- a. The Authority Board shall select an Executive Director to serve at its pleasure. The Executive Director shall be responsible to the Authority Board for the proper and efficient administration of the Authority as may be placed in the Executive Director's charge, or under the Executive Director's jurisdiction or control, pursuant to the provision of this Agreement, or any ordinance, resolution, or order of the Authority Board. In addition to the powers and duties provided, the Executive Director shall have the power to:
 - i. Plan, organize and direct all Authority activities under the policy direction of the Authority Board.

- ii. Enforce strict compliance with the approved annual budget and approve only expenditures authorized in the approved budget.
- iii. Hire and manage such staff as necessary to carry out the provisions of this agreement;
- iv. Make recommendations to and request of the governing board concerning all the matters, which are to be performed, done or carried out by the Authority Board.
- v. Have charge of, handle or access to any property of the Authority, and shall make an annual inventory of all Authority property.
- vi. Make all books and records of the Authority in the Executive Director's hands open to inspection at all reasonable times by members of the Authority Board or their representatives.

9. ORGANIZATION OF THE AUTHORITY

- a. The governing board of a regional solid waste management authority shall hold an initial organizational meeting at such time and place as agreed upon by its members units of local governments and shall elect a chair and any other officers that the charter may specify of the delegates deem advisable.
- b. The authority shall then adopt by laws for the conduct of it business.

10. MEETINGS

- a. The Authority Board shall meet a minimum of 4 times a calendar year, one of which will be face to face. The Authority Board may provide for allowances for members or alternates to attend meetings.

11. CHARTER.

- a. The charter of a regional solid waste management authority shall:
 - i. Set out the method of determining the financial support that will be given to the authority by each member unit of local government.
 - ii. Establish a method for amending the charter, and for dissolving the authority and liquidation of assets and liabilities.
 - iii. Contain rules for the conduct of the authority business and any other matter pertaining to the organization, powers, and functioning of the authority that the member units of local government deem appropriate.

12. POWERS OF AN AUTHORITY. The charter may confer on the regional solid waste management authority any or all of the following powers:

- a. To apply for, accept, receive, and disburse funds and grants made available to it by the state or any agency thereof, the United States of America or any agency therefore, any unit of local government whether or not a member of the authority, any private or civic agency, and any persons, firms or corporations.

- b. To employ personnel.
- c. To contract with consultants.
- d. To contract with the United States of America or any agency or instrumentality thereof, the state or any agency, instrumentality, political subdivision, or municipality thereof, or any private corporation, partnership, association, or individual, providing for the acquisition, construction, improvement, enlargement, operation or maintenance of any solid waste management facility, or providing for any solid waste management services.
- e. To adopt bylaws for the regulation of its affairs and the conduct of its business and to prescribe rules and policies in connection with the performance of its functions and duties.
- f. To establish suitable offices at such place as it may determine either by the authority alone or through appropriate cost-sharing arrangements with any unit of local government or other persons.
- g. To study, plan, design, construct, operate, acquire, lease, and improve systems and facilities, including systems and facilities for waste reduction, materials recovery, recycling, resource recovery, land filling, transportation, household hazardous waste management, disposal and public education regarding solid waste management in order to provide environmentally sound, cost effective management of solid waste including storage, collection, transporting, separation, processing, recycling, and disposal of solid waste in order to protect the public health, safety, and welfare; to enhance the environment for the people of the state, recover resources and energy which have the potential for further use.
- h. To locate solid waste facilities, including ancillary support facilities as the authority may see fit.
- i. To assume any responsibility for disposal and management of solid waste imposed by law on any member unit of local government.
- j. To operate such facilities together with any person, firm, corporation, the State, any entity of the State, or any unit of local government as appropriate and otherwise permitted;
- k. To set and collect fees and charges as is reasonable to offset operating costs, debt service and capital reserve requirements of the authority.
- l. To apply to the appropriate agencies of the State, the United State of America or any state therefore, and to any other appropriate agency for such permits, licenses, certificates or approvals as may be necessary, to construct, maintain, and operate projects in accordance with such permits licenses, or approvals in the same manner as any other person or operating unit of any other person.
- m. To employ engineers, architects, attorneys, real estate agents, appraisers, financial advisories and such other consultants and employees as my be required in the judgment of the authority, to fix and pay their compensation from funds available to the authority.
- n. To acquire property located with in the territorial jurisdiction of any member unit of local government by eminent domain pursuant to authorities granted local governments.

- o. To do all things necessary, convenient or desirable to carry out the purposes and to exercise the powers granted to the authority.
- p. To sue and be sued, and name and plead and be impleaded.
- q. To receive, administer, and comply with the conditions and requirements respecting any gift grant or donation of any property or money.
- r. To acquire by purchase, lease, gift or otherwise, or to obtain options for the acquisition of any property, real or personal, improved or unimproved, including an interest in land less than the fee thereof.
- s. To sell, lease, exchange, transfer, or otherwise dispose of, or grant options for any such purposes with respect to any real or personal property or interest therein.
- t. To pledge, assign, mortgage, or otherwise grant a security interest in any real or personal property or interest therein, including the right and power to pledge, assign, or otherwise grant security interest in any money, rents, charges, or other revenues and any proceeds derived by an authority from any and all sources.
- u. To issue revenue bonds of the authority and enter into other financial arrangements to finance solid waste management activities, including but not limited to systems and facilities for waste reduction, materials recovery, recycling, resources recovery, landfill, ash management, and disposal and for support facilities, to refund any revenue bonds or notes issued by the authority, whether or not in advance of maturity or realistic redemption date, or to provide funds for other corporate purposes of the authority.
- v. With the approval of any unit of local government, to use officers, employees, agents, and facilities of the unit of local government for such purposes and upon such terms as may be mutually agreeable.
- w. To develop and make data, plans, information, surveys, and studies of solid waste management facilities within the territorial jurisdiction of the members of the authority, to prepare and make recommendations in regard thereto.
- x. Subject to the specific provisions of this Agreement, this Agreement shall be binding upon and inure to the benefit of and be enforceable by the Parties and their respective successors and assigns.

13. **LONG TERM CONTRACT PERMITTED BY AND WITH THE AUTHORITY**

- a. To the extent authorized in its by laws, the Authority may enter into long-term and continuing contracts, not to exceed a term of 60 years, with member or other units of local government for the acquisition, construction, improvement, enlargement, operation, or maintenance of any solid waste management facility or for solid waste management or transportation services.
- b. Contracts entered into by an authority may include, but are not limited to, provisions for:
 - i. Payment by the members of the Authority and other units of local government of a fee or other charge by the Authority to accept, dispose of or transport solid waste.

- ii. Periodic adjustments to the fee or other charges to be paid by each member of the authority and such other units of local government.
- iii. Warranties from the members of the Authority and such other units of local government with the respect to the quantity of solid waste to be transported or delivered to the authority and warranties relating to the content or quality of solid waste.

14. APPLICABLE REGULATIONS.

- a. An authority created by this agreement shall comply with all applicable federal and state laws, regulations, rules, including specifically those enacted or adopted for the management of solid waste or for the protection of the environment or public health.
- b. *Identify any local government ordinances that maybe applicable.*

15. APPROVAL AND PERMIT REQUIREMENTS

- a. *List all approvals and permit requirements being required.*
- b. *This is only applicable if constructing or operating a landfill.*

16. DEDICATIONS AND RESERVATIONS

- a. Provide a statement of all reservations or dedications of lands, if applicable.
- b. List any other reservations the parties have agreed to.

17. DURATION OF THE AGREEMENT –TERM AND WITHDRAWAL

- a. This agreement shall be effective when signed by each Party and shall continue for so long as may be necessary to carry out the purpose of this Agreement or until terminated by mutual consent of the governing bodies of all Parties, whichever is earlier; provided, however that:
 - i. A Party to this Agreement may not withdraw from the Authority for a period of 15 years after execution of this Agreement. After the 15-year period, a Party may withdraw from this Agreement by majority vote of the governing body, giving to the other Parties one year's written notice of such intention to withdraw, so long as all revenue bonds or other forms of indebtedness shall have been paid or adequate provisions of such payment shall have been made. The Party withdrawing from the Agreement will retain its fair share of financial liability for closure and post closure and site remediation costs based on the tons of material it has contributed to the Authorities solid waste system and as determined by the Authority in its sole discretion and such determination of the Authority shall be binding on the Parties. The Party withdrawing shall be afforded the same rights and ability to use Authority facilities and services as any other governmental jurisdiction, which is not a member of the Authority.
 - ii. Upon receipt of a Party's one-year notice of intention to withdraw, the members who will be remaining in the Authority shall meet and prepare appropriate amendments to this Agreement to reflect the changed membership status. Such amendments shall become effective upon the effective date of the Party's withdrawal.

- iii. This Agreement cannot be amended in any way to the detriment of the holders of any revenue bonds or other forms of indebtedness, which are outstanding in accordance with any resolution adopted by the Authority.
- b. This Agreement shall remain in effect until terminated by mutual consent of all the governing bodies of all Parties to this Agreement. The resolution to terminate must be passed by a majority vote of each governing board of each of the Parties to this Agreement.

18. DISPOSITION OF AUTHORITY ASSETS AND LIABILITIES UPON TERMINATION:

- i. In the event of termination of the Authority where there is a successor public entity which will carry on the activities of the Authority and assume its assets, liabilities, obligations, and funds, including any interest earned on deposits, remaining upon termination of the Authority and after payment of all obligations, the assets and liabilities of the Authority shall be transferred to the successor public entity.
- ii. If there is no successor public entity which could carry on any of the activities of the Authority or assume any of its assets, liabilities, obligations, and funds, including any interest earned on deposits, remaining upon termination of the Authority and after payment of all obligations, the assets and liabilities shall be returned in proportion to the contribution of each Party during the term of the agreement. If bonds are issued or large capital projects, such as closure construction are initiated during the term of this agreement, then in no event shall the exercise of the powers granted be terminated until all bonds issued and the associated interest have been paid or provision for such payments have been made.
- iii. If there is a successor public entity which would undertake some of the functions of the Authority and assume some of its assets, liabilities, obligation, and funds including any interest earned on deposits, remaining upon termination of the Authority and after payment of all obligations, the assets and liabilities shall be allocated by the governing board between the successor public entity and the Parties.

19. AMMENDMENTS.

- a. This Agreement may be amended by affirmative vote of the governing bodies of each Party.

20. ENFORCEMENT

- a. This agreement shall be enforceable, unless lawfully terminated or cancelled by any Party to the Agreement or any Party's successor notwithstanding any subsequent changes in applicable law adopted by the Parties that alters or amends the laws, ordinances, resolutions rules or policies frozen by the Agreement.

21. LIMITATION OF LIABILITY

- a. The debts, liabilities or obligations of the Authority do not constitute debts, liabilities or obligation of the Parties and the Authority shall hold the Parties harmless and shall indemnify the Parties from any claim or loss that may arise as a result of the Authority's ownership and

maintenance of the landfill assets or the Authority's performance of any of its duties or powers described in this agreement.

- b. No officer, agent or employee of any Party shall be subject to any personal liability or accountability by reason of the execution of this Agreement or any other documents related to the transactions contemplated. Such officers, agents, or employees shall be deemed to execute such documents in their official capacities only, and not in their individual capacities. This section shall not relieve any such officer, agent or employee from the performance of any official duty provided by law.

22. HOLD HARMLESS CLAUSE

- a. If the parties agree, the agreement should contain a clause holding each other harmless from liability from damages, injury or death that may arise from the direct or indirect operations of the parties carrying out the terms of the agreement.

23. SEVERABILITY CLAUSE

- a. If any provision of this Agreement shall be determined to be unenforceable, that shall not affect any other provision of this agreement.

24. MERGER CLAUSE

- a. This agreement constitutes the entire contract between the Parties, and this Agreement shall not be changed except in writing signed by all the parties.

25. PUBLIC NOTICE

- a. *If public notice is required by local ordinance of any of the participating local governments add that language.*

26. STATEMENT OF INCORPORATION BY REFERENCE

- a. *Identify any documents related to the Agreement and being incorporated by reference into this agreement*
- b. *Include lists of conditions, schedules of completion, imposition of dedications, impact fees and development plans and specifications.*

27. SUBSIDIARY OF COLLATERAL AGREEMENTS

- a. *Identify additional agreements relating to the project from any nonparty agencies or persons.*

OUTLINE FOR A JOINT GOVERNMENT AGREEMENT

Joint Government Agreements permit local governments to join in providing constituent services. In the Joint Government Agreement, the roles and responsibilities of the participating local governments are established. The agreement details the “who,” “what,” “when,” and “where” of the activity to be undertaken together. The following outlines the general elements to be incorporated into a Joint Government Agreement.

1. DEFINITIONS

- a. List all technical terms used in the agreement.
- b. Define technical and scientific terms used in the agreement.

2. PARTIES/AUTHORITIES

- a. Provide an explanation of the need for the agreement and what it is going to provide, be broad to allow for flexibility as the project evolves.
 - i. Solid waste transportation, pickup, landfill construction and operation, recycling as appropriate.
- b. List the parties who are participating in the agreement.
- c. List the parties’ authorities to enter into the agreement.
- d. Cite legal authorities used to enter into the agreement, such as state authorizations. AS 29.35.010 and Article X, Section 13 Alaska Constitution.

3. PROPERTY

- a. Identify any property to be purchased.
- b. Identify any property to be shared.

4. INTENT OF THE PARTIES

- a. Clearly state that the parties are bound by the agreement.

5. RECITATION OF CONTRACTURAL TERMS

- a. Clearly recite the terms of the duties and obligations each party receives from the other.
- b. Clearly recite the terms of the duties and obligations that each party is providing to each other.

6. PUBLIC NOTICE

- a. Identify if a public hearing is required.
- b. State the date of the hearing ¹.

7. APPLICABLE REGULATIONS

- a. Identify any state regulations that the project will be subject to ².
- b. Identify any local government ordinances.

8. APPROVAL AND PERMIT REQUIREMENTS

- a. List all approvals being required.
- b. List permit requirements.

9. DEDICATIONS AND RESERVATIONS

- a. Provide a statement of all reservations or dedications of lands, if applicable.
- b. List any other reservations the parties have agreed to.

¹ This would be a requirement under the ordinances of one of the participating local governments as there is no requirement in the state statute.

² For this project this is the pertinent sections of 18 AAC 60

10. DURATION OF THE AGREEMENT

- a. Identify a termination date for the project as a whole.
- b. Identify commencement and completion dates for various phases as applicable.
- c. Include a statement that the termination date can be extended by mutual agreement and that commencement and completion dates can be extended at the discretion of the parties.

11. AMMENDMENTS, CANCELLATIONS OR TERMINATION

- a. Identify the conditions by which the agreement can be amended, canceled or otherwise terminated.
- b. Note that parties can only terminate the agreement under the circumstances spelled out in the agreement

12. PERIODIC REVIEW

- a. Provide for periodic reviews in order to determine compliance with the agreement.
- b. Specify who is responsible for reviews.
- c. Identify procedures for dealing with situations in which minor and major noncompliance issues are discovered.

13. REMEDIES

- a. Identify remedies for breach on the part of any party to the agreement.

14. ENFORCMENT

- a. Specify that the agreement shall be enforceable, unless lawfully terminated or cancelled by any party to the agreement or any party's successor notwithstanding any subsequent changes in applicable law adopted by the parties that alters or amends the laws, ordinances, resolutions rules or policies frozen by the agreement.

15. HOLD HARMLESS CLAUSE

- a. If the parties agree, the agreement should contain a clause holding each other harmless from liability from damages, injury or death that may arise from the direct or indirect operations of the parties carrying out the terms of the agreement.

16. INSURANCE BONDS

- a. Identify any insurance coverage required and/or secured by any party of the agreement affecting any aspect of the project.
- b. Identify existing bonds in detail, as well as bonds required by the agreement.
- c. Cite applicable ordinances related to bond requirements.

17. SEVERABILITY CLAUSE

- a. Identify the provisions of the agreement that are severable, if there are any.
- b. Identify any severability limitations.

18. MERGER CLAUSE

- a. Specify that the terms of the agreement as stated in the written document are a final and complete expression of the parties' intentions.

19. STATEMENT OF INCORPORATION BY REFERENCE

- a. Identify all documents related to the agreement and incorporated into the agreement by reference.
- b. Include lists of conditions, schedules of completion, imposition of dedications, impact fees and development plans and specifications.

20. COOPERATION

- a. Identify the extent to which the parties will cooperate in their efforts to carry out the terms of the agreement.

21. SUBSIDIARY OF COLLATERAL AGREEMENTS

- a. Identify additional agreements relating to the project from any nonparty agencies or persons.

OUTLINE FOR AN AUTHORITY CREATED UNDER A JOINT GOVERNMENT AGREEMENT

The following outline's the elements to be incorporated in an agreement establishing a new authority, if needed, to oversee the tasks and responsibilities established in the Joint Government Agreement.

1. **PURPOSE** - describe what the authority is to do i.e. provide regional solid waste transportation, solid waste pickup, landfill construction and operation and or recycling as appropriate. Be flexible in description to allow for some evolution of the project.
2. **ESTABLISHMENT OF THE AUTHORITY** – clearly state that the authority is being established - AS 29.35.010 and Article X, Section 13 Alaska Constitution.
3. **MEMBERSHIP** – describe the membership of the governing body and how members join.
 - a. Decide if there is to be a critical mass clause that states that no parties are bound unless and until at least “X” other potential parties also join in.
 - b. Are there to be alternate roles such as non voting member, customers
 - c. Describe who can't participate.
4. **VOTES** – determine how many votes each member/community will have. Determine if each community will have one vote or if communities with larger populations and thus a greater contribution of solid waste will have more than one vote. Determine if the community hosting the landfill, if there is one, will have more than one vote.
5. **QUORUM** – determine what constitutes a quorum for conducting business.
6. **TERMS OF OFFICE** - determine the length of each member's term in office.
7. **ALTERNATES** – describe how many and how they are to be empowered.
8. **OFFICERS OF THE AUTHORITY BOARD** – describe who the officers are, how they are elected and what their responsibilities are.
9. **MEETINGS** – determine how often and where meetings of the authority are to occur.
10. **POWERS AND FUNCTIONS**- describe the powers given to the authority such as:
 - a. Acquisition, assumption and management of facilities, such as a landfill and solid waste transportation system.
 - b. Planning, construction of facilities such as a landfill
 - c. Preparation of plans,
 - d. Establishment of rates, fees, charges and surcharges,
 - e. Granting of franchises, concession, licenses and other rights and entitlements,
 - f. Exercise of power of eminent domain to acquire and dispose of property if applicable,
 - g. Ability to apply for and receive grants,
 - h. Ability to issue revenue bonds or other obligations,
 - i. Ability to adopt by-laws,
 - j. Ability to obtain permits.
 - k. Describe what the entity cannot do.
11. **ASSUMPTION OF PROGRAM RESPONSIBILITIES** – explain if the authority is taking responsibility for management of any assets.
12. **BUDGETS** – describe the budgetary process for the authority.
13. **RATES** – describe the process of rate setting if applicable. Determine if the landfill host community receives any benefits when rates are set.
14. **LIMITATION OF LIABILITY** – state that the debts, liabilities or obligations of the authority do not constitute the debts, liabilities or obligations of the communities participating. Discuss the liability of waste transporters, if transporters, are not the authority.

15. **LAND USE RESTRICTIONS** - describe any land use issues associated with actions of the authority, if applicable.
16. **TERMS AND WITHDRAWAL** – describe the terms of the authority and how a party can withdraw if possible.
17. **TERMINATION OF THE AUTHORITY** - describe how and when the authority can be terminated.
18. **DISPOSITION OF AUTHORITY ASSESSTS AND LIABILITIES UPON TERMINATION** – describe what happens to holdings and obligations when the authority is terminated.
19. **AMENDMENTS** - describe how the agreement can be amended.
20. **RESTRICTIONS OF AUTHORITY** – describe if this agreement restricts or alters any of the parties’ authorities.
21. **DEFINTIONS** – define all the terms used in the agreement.
22. **EFFECTIVE DATE**- establish the date the agreement becomes effective.

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MEMORANDUM

TO: Rollo Pool, Executive Director, Southeast Conference

FROM: David A. Lawrence

SUBJECT: Legal Review – Solid Waste Regional Entity Project

DATE: July 20, 2005

Southeast Conference (“SEC”) retained this law firm to provide legal review and analysis of several issues related to the formation of a new entity to plan and provide solid waste transportation, processing, recycling, and disposal services in Southeast Alaska, which also could be a model for similar organizations elsewhere in the State. This Memorandum constitutes our report to SEC.

First, it discusses the choice of form for the entity, building upon the work already performed by Ecology & Environment, Inc. (“E&E”). Second, it discusses two outlines related to a joint government agreement. Third, it discusses the possible need for statutory or regulatory changes to accommodate the recommended form(s) for the new organization. Finally, it renders an opinion on the potential legal liability of members of the new solid waste entity.

We appreciate the opportunity to work with SEC in this important project, and would be pleased to provide additional assistance in any way we can in future phases of this and other regional development initiatives.

Scope and Assumptions

We have reviewed the documents provided by SEC on this topic, including the June 2, 2005, memorandum from Stephanie Pingree of E&E and the attached Entity Matrix

(“E&E Memo”), and the outlines for an agency created under a joint government agreement and for a joint government agreement. In addition, we have reviewed Alaska statutes and case law related to key issues, including: liability of participants, owners, or members of various types of entities; the ability of unorganized or unincorporated government entities to participate in joint government agreements; and existing statutes for entities such as port authorities. We have not attempted to replicate the work already done by E&E, such as a survey of approaches taken in other parts of the country to coordinate solid waste programs on a regional basis.

We have assumed for purposes of our analysis that the primary participants in a new solid waste entity will be local units of government, and not private businesses or other non-government entities. A parallel assumption is that new entity needs to be qualified to receive a variety of state and federal grants to fund the planning and implementation of new solid waste transportation, treatment, and disposal projects. We also have assumed that the potential range of activities for a regional solid waste entity are very broad, and that one of its purposes will be to explore the feasibility of a wide range of coordinated services that could be provided both to its members and to non-members. Finally, we have assumed that services related to solid waste could be provided by the new entity to members and non-members under separate service contracts.

Choice of Entity

The choice of form for a new organization is highly dependant on the nature of the participants, their reasons for associating, and the activities they plan to pursue. The E&E matrix sets out some of the many considerations that underlie the choice. We believe that the overall recommendations of E&E as discussed in the E&E Memo are correct, though we have additional thoughts and concerns on the topic.

Business Corporation. This is not the recommended form for several reasons, including taxability of income, disqualification for grants, and the general requirement that returns must be proportional to dollar investment. If the participants were primarily private parties involved in the solid waste industry for profit, this would a possible form to use, though even then an LLC would be the better choice.

Nonprofit Corporation. Nonprofits are often used for charitable, educational and community purposes, but typically not for carrying out proprietary government functions such as solid waste collection and disposal. It may not qualify for tax exempt status (which is a very separate issue from non-profit status under state law), and if such an entity did not qualify, it would have the same tax drawback as a business corporation without the advantage of being well-designed to raise capital through issuing equity and

debt instruments. Since the new entity may be supported partly with debt financing, this is not an attractive choice.

Limited Liability Company. If the participants in the enterprise were going to be primarily private parties and not government entities, we would recommend this form. The reason is that it provides the liability shield of a corporation with the pass through taxation feature of a partnership (avoiding company-level taxes and allowing tax exempt members to avoid all income taxes). It also provides the maximum freedom to those forming the company to specify who invests, controls, and shares in any distributions. For example, there an LLC provides the flexibility to have different percentages of initial funding, voting control, and entitlement to distributions, in whatever way works best for the members. The members can manage the company themselves or through one or more managers who may or may not be members. However, if the solid waste entity is not in business for profit and wants to qualify for government grants to the maximum extent possible, this would not be the best choice.

Cooperative Corporation. The cooperative form has most of the good and bad points of the LLC. One advantage may be that if a cooperative is formed, it may be possible to get at least limited funding from the federal government for forming and operating the cooperative. This appeared to be a strong consideration of SEC in using this form for the new intertie entity. Two disadvantages are a requirement that every member be allowed an equal vote, even if their sizes, investments, and purchases of services are very different, and the requirement that to be a member one must contract for services from the cooperative. While it may be that eventually all of the communities in Southeast will purchase services from a solid waste entity, at first there will be few, if any, services, so many communities would be barred from membership, which could detract from their interest in participating at all.

General Partnership. This option was not discussed in the E&E Memo. From a legal standpoint, it would be very similar to an agency created by contract, which was discussed by E&E. The advantage is great flexibility regarding ownership and sharing of benefits. There are, however, two significant drawbacks. The first is that typically all of the members are also co-equal managers of the daily operations, so there is a potential lack of focused management. The second is that it provides no liability protection to the members for claims and liabilities of the partnership – there is joint and several liability. In a worst case this means that if there are ten partners and nine are insolvent, the tenth is liable for 100% of the partnership obligations. This concern is discussed further below under the Joint Government Agreement section.

Limited Partnership. The benefits and detriments for this form of organization are similar to the LLC. It has the additional drawback, however, of the unlimited liability

of the one or more general partners. That is why the general partner of an LP is typically a corporation formed to serve as the general partner, so its corporate status protects its ultimate owners from liability for the organizations debts. The E&E Memo observes that most participants will not be satisfied with the necessarily passive management role of the limited partners, though that may not turn out to be true if their main concern is having an entity to provide them services. If the job is being done well, they may not feel a strong need to have a major management role. On the other hand, it is not likely that they will want to take on the significant liability of a general partner in order to play the managing role of a general partner. That is why an LLC would be the better choice between the two. As discussed above, however, unless the solid waste entity will have significant non-government members, the LLC form is not the best choice either.

Federation and Commission. As described in the E&E Memo, a federation is essentially like a port authority, with specific enabling legislation and purposes. We do not view it as a materially different option. From the brief discussions, it appears that E&E viewed a commission to be something like the Federal Communications Commission. SEC is undoubtedly familiar with a variety of governmental agencies with regulatory and rulemaking powers. There already is an Alaska agency which oversees solid waste, DEC, yet it is not constituted to undertake the kinds of initiatives and projects envisioned by the SEC for solid waste in the region. Therefore, we do not believe a commission as described in the E&E Memo is advisable for the solid waste entity.

Joint Government Agreement. While we agree for the most part with the E&E discussion of the joint government agreement option, we do not believe it is as good a form as the use of an authority created under specific enabling legislation. We note E&E's concern about the potential difficulty of having an unincorporated municipality involved in ownership and control. However, this may not be the problem it first appears because an unorganized or unincorporated government entity, while not specifically mentioned in AS 29.35.010, may be considered "local government" under Art. X, Sec. 13 of the Alaska Constitution. There are, though, two other serious concerns we have about using a joint government agreement. First, a non-government entity could not be a party to the agreement because, under both the statute and Constitution, this kind of agreement may only be made among government units (while the enabling legislation for an authority could allow for participation of at least a minority number of non-government units). The second reason is that a joint government agreement, absent some special legislation, will not provide limitations on liability of the parties for the liabilities and debts of the entity. The legal status of a joint agreement is akin to a general partnership. The parties by agreeing among themselves that they will limit their liability cannot bind or curtail the right of third parties, be they creditors, persons injured at a solid waste disposal site, or landowners whose groundwater is claimed to be contaminated by

operation of a solid waste facility. While there are some statutory limitations on liability exposure of government subdivisions, such as those found in AS 9.65.070, the activities of a solid waste entity would for the most part not come under the scope of that protection. As a consequence, other than operating to minimize risk and maintaining generous insurance coverage, the municipal parties could all be jointly and severally liable for the entity's debts and obligations. Since there are many potential large liabilities in operating solid waste facilities, including pollution fines, personal injuries, property damage, service contract violations, and employment-related claims, we believe participating units of government will be better served, and will be more eager to participate, if they did not take on unlimited liability. This seems to be more important than the advantage of not requiring new legislation, though it is a judgment call to be made by the potential participants.

Authority. The E&E Memo did not find any drawbacks for the use of a statutorily constituted authority serving as the solid waste entity, other than the obvious point that it would require new legislation. The existing legislation for other kinds of authorities is far too limiting to be used for a solid waste entity. Since there are good statutory models to follow, unless there is some particular political opposition to enabling legislation that would allow communities to form solid waste authorities just as they form port authorities, this drawback is not significant. In fact, all things considered, we believe it is the most attractive option given the kinds of participants – government entities – and the range potential projects and services that may be developed. The enabling legislation ideally would allow the potential participants broad discretion in setting up their governance, purposes, and structure, keeping in mind the overall purpose of assisting communities in finding the best solutions to solid waste issues. The authority structure meets all of the criteria, including qualification for grants, ability to raise capital, favorable tax status, and limitation of liability. The only drawbacks appear to be that it may take some effort to set up an authority in that, depending on the enabling legislation, there may be a need for communities to pass referenda, or at least ordinances, to become participants, and there may be restrictions on non-government entities becoming participants. That does not mean, however, that non-participants could not become satisfied customers of services offered by the authority. By beginning at this time, a draft bill, sponsors, and supporters could be gathered before the start of the 2006 session. Therefore, since an authority would meet all of the essential requirements with minimal drawbacks, we recommend that primary consideration be given to seeking legislation that would allow the use of solid waste authorities in Southeast Alaska and elsewhere in the state.

Joint Government Agreement Outlines

Although a joint government agreement is not our primary recommendation, SEC desired a review of the two outlines that were provided with the package of materials.

Outline for an Authority Created under a Joint Government Agreement.

Both outlines are essentially checklists of matters to be covered in a document rather than a core set of substantive terms. All of the various terms mentioned in the outline need to be covered, or at least merit consideration, and undoubtedly more terms would need to be considered as well. In other words, the outlines may provide good starting places for discussions. The Outline for an Authority is difficult to critique, since it sets out the kinds of structural and organizational terms that any form of entity requires, with the difference being that this form is not based on any enabling statute so that all of the structure needs to be in the agreement. However, we want to mention the following considerations with respect to particular sections of the outline:

Section 1. The purpose clause at the outset ought to be broad and flexible because the specific projects and services that may be provided in the future are not known. In fact, one of the main initial functions of the entity from the outset may be to provide a forum for the parties to study and discuss what particular initiatives they want to undertake first, second, and third, or not at all.

Section 2. We recommend that the statutory and Constitutional provisions under which the entity is formed also be set out.

Section 3. It may be that unincorporated municipalities could be allowed to join, and this section needs to deal with this aspect of qualification. It also needs to set out what entities may not join, and in what alternate roles, such as non-voting participants or customers, such entities may associate with the agency.

Section 10. The powers clause needs to be as broad as possible without allowing the controlling parties to wander too far afield in future. This can be accomplished if the section also states what the entity may not do.

Section 14. A limitation of liability section can state that the parties do not undertake liability to one another as a result of the agreement, but it would not be effective for the parties to attempt to agree that they will not be liable to regulators and third parties for debts, claims against, or fines of the entity. This is because the only person that can agree to absolve the parties of such liability is the person to whom the debt or fine is owed, and those persons will not be parties to the joint government agreement. As discussed above, this is a drawback to using this form of entity.

Outline for Joint Government Agreement. We had some difficulty understanding the thrust of this outline. What is not clear is whether the intent is a generic services contract between the entity and particular parties or non-parties under which the entity would provide solid waste services, or if it was an agreement between the entity and a private third party to provide such services to the entity, or both. In our view, the entity may outsource a lot of functions related to, for example, a landfill to

various third parties, including (perhaps by separate contracts) the design, permitting, construction, and operation of a facility. At the same time, the entity could contract with municipalities and others who may be, but need not be, parties of the joint government agreement, to provide services to them, much like a garbage hauler contracts with a homeowner for weekly pickup. This particular outline does not seem to be designed to fit either of these situations. As a result of this uncertainty of its function or intent, it is difficult to provide on-target comments on this particular outline. Nevertheless, the following matters come to mind when reviewing its content:

Section 2a. At this time it is not possible to draft this section because the entity has not been formed and the particular services that it may offer in the future have not been determined. This section needs to be very clear about the time, place, quality and price for specific solid waste services, and must be left blank for now.

Section 2b. It was not clear what parties would be involved with the outlined agreement. If this is a contract to service the needs of a particular city, the parties to the contract would be the solid waste entity and the city. If it is an agreement with a third party, for example, to operate a landfill for the benefit of the entity, the parties would be the entity and the landfill service provider. It is not likely that the entity would be ignored or omitted as a party, with the cities contracting directly with a third party landfill operator. That is how things are done today, and the new entity, as we understand it, was contemplated as a central figure in future arrangements for solid waste services.

Section 3. At this time it is unclear if any property will be purchased or shared. It may turn out that the entity only facilitates services, and will not itself own or operate equipment. Even where it is going to own and operate equipment, the entity need not include in a services contract with a city a list of equipment it plans to purchase to provide the service – it would just agree to provide the service. Likewise, we would not expect a third party providing services to the entity to recite in its contract the particular equipment it plans to purchase or use to provide the services required by the contract. If the entity itself planned to purchase and operate equipment, it would meet and make a decision under the auspices of its management structure (established under a joint government agreement), would not need to include a property list in its service contracts, and would not need execute a new contract among the parties to the joint government agreement for every action it takes. Instead, the parties would simply pass a resolution using the decision-making structure established in the joint government agreement.

Section 7. It may be helpful, but is not necessary, to recite the applicable laws and regulations. It is more common to have the parties to agree to comply with all applicable laws and regulations as they now exist or may exist in the future. If local ordinances are needed to allow participation by a city in the agreement, then the agreement may need a “critical mass” clause that states that no parties are bound unless and until at least “X” other potential parties also join in. Then, the first and the last city to consider the proposition can both act with confidence that they will not be joining an entity that does not have adequate participation from other government units.

Section 15. The idea of a hold harmless clause does not make sense as described. The only persons bound by the agreement are the parties themselves, and they already will be jointly and severally liable for the obligations and debts of the entity. If they all want to be held harmless, who will do the holding? The agreement cannot be used to create hold harmless terms that are binding on persons who are not parties to the agreement, so by operation of law the parties to the agreement would remain liable to third parties regardless of the text of their agreement.

Statutory or Regulatory Changes

We do not believe that formation of a solid waste entity of the kind under discussion would require any changes to state regulation. The DEC regulation of waste material deals primarily with how it handled, not who handles it. The only entity option that would definitely need statutory changes is an authority akin to a port authority. Changes could be made to the AS 29.35.010 to make a joint government agreement a better option, such as statutory limitations on liability and participation of some non-government members, but such changes, though desirable, would not be essential.

As discussed above, a solid waste authority statute ideally would be of state-wide application, would provide broad purposes and great flexibility for structure, management and control, and could be patterned after the existing Alaska port authority statute (AS 29.35.600 et seq.) or else after a statute from another state. While we cannot predict political winds, there is nothing obviously controversial about a bill that provides municipalities a new and efficient way to work cooperatively to reduce solid waste problems. Given the timetable of the SEC solid waste initiative, it appears that little if any time would be lost in continuing to use the existing SEC committee system to refine plans and procedures while at the same time preparing for the introduction of a successful bill.

Liability of Cooperating Members

Persons conducting activities through a commonly owned or operated organization of any kind cannot be guaranteed immunity from claims for debts or wrongdoing of the organization. They could easily be named in a lawsuit and need to defend their interests even if they ultimately are found to be insulated from liability. Neither can they be completely sure that a court would not find a basis for disregarding the organization form and reaching through to impose liability directly on the participants for obligations of their organization. If certain kinds of entities are funded and operated as separate entities, then the law does provide a high degree protection to the owners or members. This requires properly forming the entity, holding regular meetings, providing adequate capitalization, maintaining separate identities in communications, marketing, and contracts, and similar formalities. Even then, to the extent an owner or member is

directly involved in the wrongdoing, or else affirmatively guarantees an entity obligation, there could be direct liability.

Assuming that these safeguards are observed, we believe the “cooperating members” would be protected from liability for the entity’s obligations in the case of a business corporation, non-profit corporation, LLC, cooperative, limited partnership (but only for the limited partners), and authority (assuming the enabling legislation says so). They would not be insulated in the case of a general partnership or joint government agreement (unless a statutory change said so). Of course, except to the extent they are properly insured and include terms in their service and other contracts to limit their liability, today they are not insulated from liability for most of their current activities taken in the solid waste area, so some risk exposure would not be something new. However, taking on joint and several liability for large regional projects would involve a significant step-up in liability because of the greater extent of the operations and the fact that some of the other participants may not financially be able to shoulder their share of a claim, so it would be redistributed to the members with the deeper pockets. This is the reason why liability considerations are important, and an entity that provides liability protection is far preferable to one that does not.

Conclusion and Recommendation

The only choice that provides liability protection and at the same time can easily qualify for grant money while meeting other key requirements is a statutorily-based authority. We therefore recommend that this option be given the most serious consideration and that, if it is found to be the choice of SEC, initiatives be undertaken soon with an eye toward introduction of a bill in the 2006 session of the Legislature. Because of the liability problem associated with a joint government agreement, it is a less attractive option. Special legislation may be possible to extend some form of liability limitation to parties of agreements of this kind, but if legislation is needed, it makes more sense to obtain enabling legislation for an authority because it is a well-developed path and would provide a basic framework for the organization. If it ultimately turns out that non-government entities are going to be major participants in terms of ownership or management, and that the entity will operate more as a business than an extension of government, then our first recommendation would be a limited liability company, with a cooperative as a second place alternative.

Please contact us if SEC has any questions or additional concerns regarding the topics covered by this memorandum.